

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JAMES MCDONALD,

Plaintiff,

v.

ONEWEST BANK, FSB, NORTHWEST
TRUSTEE SERVICES, INC., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC., INDYMAC BANK FSB, DOES 1-50,

Defendants.

No. 2:10-cv-01952-RSL

PRE-EVIDENTIARY HEARING
MEMORANDUM OF DEFENDANTS
ONEWEST BANK, FSB, AND
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

INTRODUCTION

Defendants OneWest Bank, FSB (“OneWest”) and Mortgage Electronic Registration Systems, Inc. (“MERS”) file this memorandum to address the law and facts related to some of the issues raised by the Court in its Order For Evidentiary Hearing of December 6, 2012, Docket #206 (“Order”). This memorandum will address: 1) Washington agency and other pertinent law related to OneWest’s assertion that it possessed the relevant promissory note (the “Note”) prior to issuance of a notice of default to plaintiff; 2) OneWest’s responses to discovery requests of plaintiff; and 3) the circumstances under which OneWest obtained plaintiff’s credit report and the applicable statutory and case law.

DISCUSSION

The Attorney-Client Privilege

In order to fully address the issues raised in the Court's Order, OneWest may need to provide a limited waiver of the attorney-client privilege, and may need to disclose at least some sensitive proprietary and confidential information. In that event, defendants will be requesting at the hearing a ruling from the Court that a limited waiver of the attorney-client privilege will not act as a complete waiver of the privilege in this case.¹ Such limitation of waiver is warranted by the circumstances of this case and by case law. *See, e.g., Ariz. ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 560 (D. Ariz. 2011) ("[O]nce the attorney-client privilege has been waived, the waiver is limited to those communications that pertain to the subject matter of the waived communication.").

OneWest's Possession of the Promissory Note

As explained in OneWest's Motion to Supplement Record (Doc. # 204), OneWest held the Note at issue in this case by May 19, 2009, through its document custodian, Deutsche Bank National Trust Company ("DBNTC"). Mr. Corcoran from DBNTC will also be available by phone at the Hearing to further explain DBNTC's role as custodian of documents on behalf of OneWest.

The Court in its Order specifically directed OneWest to address possession of the Note in relation to Washington agency law. Under Washington law, an agency relationship exists, expressly or impliedly, when one party acts under the direction and control of another. *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc.*, 103 P.3d 1256, 1260 (Wash. Ct. App. 2005). "An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's

¹ OneWest anticipates that, depending on the testimony given and the documents presented, it may also seek from the Court at the close of the hearing an order sealing certain testimony given at the hearing as revealing attorney-client privileged information or sensitive proprietary information.

objectives.” Restatement (Third) Property § 2.02 (2006). Mr. Corcoran’s declaration and the two exhibits thereto (which were both previously produced in this case) establish that OneWest entered into an agreement with DBNTC in which DBNTC agreed to, and did, keep loan documents in its custody on behalf of and for the benefit of OneWest. That is, OneWest delegated to DBNTC agency authority to keep custody of the physical loan documents. *See* Corcoran Decl. Ex. A.

While OneWest has found no Washington case directly on point, other courts have found the limited agency relationship described by Mr. Corcoran and the attached exhibits as giving OneWest “constructive possession,” of the note and have consistently held that a note holder may constructively possess a note through a custodian. *See, e.g., In re McFadden*, 471 B.R. 136, 175 (Bankr. D.S.C. 2012) (explaining that holder constructively possessed note through third-party document custodian); *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304, 1315, 1994 WL 828403 (D.S.C. 1994) (same, and collecting cases) *aff’d sub nom. C.W. Haynes & Co. Inc. v. Midfirst Bank, SSB*, 87 F.3d 1308, 1996 WL 308285 (4th Cir. 1996); *Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1195 (E.D.Va.1994) (same).

In *McFadden*, the court interpreted the relevant section of the South Carolina Code, which uses substantially the same standard for defining “holder” as Washington. Both statutes include as a note “holder” one in possession of a document indorsed to the possessor or indorsed in blank. *Compare* S.C.Code § 36–1–201(20) *with* RCW 62A.1-201(21). The court in *McFadden* then held that the party seeking to enforce the promissory note was a “holder” because the party “had constructive possession of Debtor’s note through its agent [custodian], U.S. Bank, and could obtain the note at any time simply by requesting it from U.S. Bank.” 471 B.R. at 175. Similarly, the court in *Bankers Trust* explained that “a party has constructive possession of a negotiable instrument when it is held by the party’s agent, or when the party otherwise can obtain the instrument on demand.” 865 F. Supp. at 1195.

1 Ultimately, the title placed on the relationship between OneWest and DBNTC here is
 2 not as important as the reality: DBNTC agreed to keep the loan documents safe on behalf of
 3 OneWest, and to produce them to OneWest upon OneWest's demand. Just as importantly,
 4 when OneWest demanded the loan file from DBNTC, DBNTC did in fact send it immediately.
 5 Thus, OneWest was in constructive possession of the promissory note through DBNTC as of
 6 May 19, 2009. Plaintiff has never provided any authority to suggest that OneWest did not
 7 constructively or otherwise possess the loan documents here through DBNTC.

8 **Production of Documents**

9 The Court has directed OneWest to explain its failure to provide substantive responses
 10 to certain of plaintiff's interrogatories and requests for production. Witnesses and counsel for
 11 OneWest are prepared to do so. The evidence will show that OneWest does not have possession
 12 or control of some of the requested documents, some responsive documents were already
 13 provided, and additional ones are now offered, but that none of the additional documents are
 14 relevant to any of plaintiff's claims or defenses.²

15 **Plaintiff's Credit Report**

16 The Court in its Order directs OneWest to explain how it came to possess plaintiff's
 17 credit report in July 2012. OneWest requested plaintiff's credit report in July 2012 from
 18 Equifax in order to investigate and respond to plaintiff's claims in this case.

21 ² OneWest will also present evidence to clarify one portion of the record that the Court has
 22 specifically noted in its Order; Docket Number 163, Exhibit 13 thereto, pages 3, 4, and 8.
 23 Exhibit 13 is what plaintiff claimed was OneWest's verified response to his First Set of
 24 Interrogatories and Requests for Production of Documents. In fact, OneWest did not verify the
 25 pleading that is Exhibit 13. The pleading that OneWest verified contains a different response to
 26 Request No. 7 on page 8. Counsel for OneWest, Heidi Buck Morrison, is prepared to explain
 the history of this apparent confusion to the Court with accompanying evidence in the form of
 emails and pleadings. It is not clear how OneWest's verification became attached to the wrong
 pleading, which plaintiff submitted to the court. It is also likely the differences between the
 verified pleading and what plaintiff submitted to the Court are not material to the Court's
 concerns, but the pleadings in the record should nevertheless be complete and accurate.

OneWest's request was permissible under the law. 15 U.S.C. § 1681b(a) provides circumstances under which a credit report may properly be provided to a requesting party. In particular, 15 U.S.C. § 1681b(a)(3)(A) covers a party who "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer." That provision allows a party to obtain a credit report during litigation in certain circumstances, including this one where OneWest was attempting to enforce the loan documents by way of a non-judicial foreclosure, and plaintiff brought affirmative claims related to that loan. *See James v. Interstate Credit & Collection, Inc.*, No. 03-CV-1037, 2005 U.S. Dist. LEXIS 15495 at *5, 12–15 (E.D. Pa. July 29, 2005) ("Given plaintiff's FDCPA claim against the Defendant arising out of its collection efforts . . . , it was appropriate for Defendant to obtain Plaintiff's consumer report to assess its possible liability under the FDCPA.") (opinion attached as Attach. 1, hereto); *McNall v. Credit Bureau*, 689 F. Supp. 2d 1265, 1273–74 (D. Or. 2010) (enforcement of medical services debt a permissible purpose under section 1681b(a)(3)(A)).

In *James*, the court explained that a debt collector properly requested a consumer's credit report in order to defend itself against a claim by the consumer against the debt collector under the Fair Debt Collection Practices Act. *James*, 2005 U.S. Dist. LEXIS 15495 at *14–15. That court also held that the request for the credit report was independently permissible under section 1681b(a)(3)(F), because the defendant had a "legitimate business need" to obtain the plaintiff's credit report in order to investigate how the matter was being reported by the credit reporting agency. *Id.* at *15.

The Ninth Circuit's recent case law on section 1681b(a) is consistent with the foregoing analysis. In *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665 (9th Cir. 2010), the Ninth Circuit addressed the definition of "involving" in section 1681b(a)(3)(A), and determined that it included (at least) two things: (1) the extension of credit to, or review or collection of an

1 account regarding a credit transaction voluntarily entered into, or initiated, by the debtor; or (2)
 2 the collection of any alleged debt that has been reduced to a judgment, whether or not the
 3 consumer originally entered the credit transaction voluntarily. *Id.* at 675–77. There, a towing
 4 company towed the consumer’s car from a public street and then demanded payment for the
 5 towing costs. *Id.* The Court held that the credit transaction at issue did not “involve” the
 6 consumer—but only because the alleged debt arose by operation of law without any affirmative
 7 action by plaintiff. *Id.* Thus, *Pintos* is consistent with *James* and *McNall* and further supports
 8 the application of 1681b(a)(3)(A) here. Indeed, the court in *McNall* discussed the *Pintos*
 9 decision at length and explained that where the consumer did initiate or participate in the
 10 underlying credit transaction, section 1681b(a)(3)(A) is applicable, consistent with the
 11 reasoning in *Pintos*. *See McNall*, 689 F. Supp. 2d at 1274.

12 Here, there is no question that plaintiff entered into a credit transaction to purchase real
 13 property—as evidenced by the Note and Deed of Trust—and plaintiff does not dispute that.
 14 Rather, plaintiff argues in this case about OneWest’s rights to enforce those loan documents,
 15 and brings affirmative claims based on OneWest’s attempts to enforce the loan documents.
 16 OneWest obtained the credit report to respond to the claims arising out of its attempts to
 17 enforce the loan documents, and it had a “legitimate business reason” for verifying the manner
 18 in which that debt was being reported. OneWest therefore had the right to request a credit
 19 report under both sections 1681b(a)(3)(A) and 1681b(a)(3)(F). *See James*, 2005 U.S. Dist.
 20 LEXIS 15495 at *14–15.; *McNall*, 689 F. Supp. 2d at 1273–74.

21 Dated: January 28, 2013.

22 ROUTH CRABTREE OLSEN, P.S.

23 /s/ Heidi E. Buck Morrison

24 Heidi E. Buck Morrison, WSBA # 41769
 25 Attorneys for Defendants OneWest Bank, F.S.B.,
 26 Mortgage Electronic Registration Systems, Inc.,
 and Northwest Trustee Services, Inc.

LARKINS VACURA LLP

/s/ Julie R. Vacura

Julie R. Vacura, WSBA # 34588

Joseph D. Mueller, OSB # 111780 (*pro hac vice*)

Attorneys for Defendant OneWest Bank, F.S.B.
and Mortgage Electronic Registration Systems,
Inc.

CERTIFICATE OF SERVICE

I am employed in Multnomah County, State of Oregon. I am over the age of 18 and am not a party to the within action; my business address is 621 SW Morrison St., Suite 1450, Portland, Oregon 97205.

On January 28, 2013, I served the following document(s) described as:

**PRE-EVIDENTIARY HEARING MEMORANDUM OF DEFENDANTS
ONEWEST BANK, FSB, AND MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.**

on the party or parties listed on the following page(s) in the following manner(s):

☐ **BY HAND DELIVERY:** For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be delivered by messenger to the street address(es) indicated on the attached service list.

☐ **BY FEDERAL EXPRESS:** For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be delivered by Federal Express to the street address (es) indicated on the attached service list.

☐ **BY FIRST-CLASS MAIL:** For each party, I caused a copy of the document(s) to be placed in a sealed envelope and caused such envelope to be deposited in the United States mail at Portland, Oregon, with first-class postage thereon fully prepaid and addressed to the street address(es) indicated on the attached service list.

☐ **BY FACSIMILE:** For each party, I caused a copy of the document(s) to be sent by facsimile to the facsimile number(s) indicated on the attached service list. If this action is pending in Oregon state court, then printed confirmation of receipt of the facsimile generated by the transmitting machine is attached hereto.

☐ **BY E-MAIL:** For each party, I caused a copy of the document(s) to be sent by electronic mail to the e-mail address(es) indicated on the attached service list. If this action is pending in Oregon state court, then I received confirmation that the e-mail was received.

☒ **BY ECF:** For each party, I caused a copy of the document(s) to be sent by electronic mail via ECF to the e-mail address(es) indicated on the attached service list.

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

/s/ Julie R. Vacura
Julie R. Vacura

Ha Thu Dao

hadaojd@gmail.com

Attorney for Plaintiff